STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Hon. David H. Sawyer, P.J., Hon. Joel P. Hoekstra and Hon. Michael R. Smolenski, J.J.

JAMES JONES,

Plaintiff-Appellee,

v

Supreme Court No. 120991

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

Court of Appeals No. 236835

_____/

Lenawee County Circuit Court
No. 01-0477-AH

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION

I. **Did the Parole Board maintain jurisdiction to revoke the parole of Plaintiff accused of parole violation where Plaintiff admitted the violation at a proceeding held prior to the 45th day of availability for return to the Department of Corrections but was provided with the mitigation opportunity after the 45th day of availability?**

APPELLANT'S STATEMENT OF FACTS

This case is an appeal by the Defendant-Appellant, Michigan Department of Corrections (Department) from the Court of Appeals November 30, 2001, Order granting Plaintiff-Apellee James Jones (Jones) a Writ of habeas Corpus reinstating Jones to parole. (App. p 6a)

In March, 2001, Jones was a parolee accused of a violation of parole. He was arraigned on three parole violation charges 39 days after he was detained solely as a parole violator and pleaded guilty to parole violation Counts I and II. Jones requested a fact-finding hearing to contest Count III. The fact-finding hearing was not held until the 66th day of his availability for return to a state correctional facility. MCL 791.240a is quoted in full in Appellant's Appendix 11a – 12a. MCL 791.240a(1) provides:

> Within 45 days after a paroled prisoner has been returned or is available for return to a state correctional facility under accusation of a parole violation other than conviction for a felony or misdemeanor punishable by imprisonment under the laws of this state, the United States, or any other state or territory of the United States, the prisoner is entitled to a fact-finding hearing on the charges before 1 member of the parole board or an attorney hearings officer designated by the chairperson of the parole board. The fact-finding hearing shall be conducted only after the accused parolee has had a reasonable amount of time to prepare a defense. The fact-finding hearing may be held at a state correctional facility or at or near the location of the alleged violation.

The attorney hearing officer dismissed parole violation Count III due to a failure to comply with MCL 791.240a(1) that provides the fact-finding hearing be held within 45 days of accused parole violator's availability. However, the hearing officer did receive evidence in mitigation of Counts I and II before making a recommendation to the Michigan Parole Board that Jones's parole be revoked and that he remain incarcerated for 18 months before being reconsidered for parole. The Parole Board accepted the hearing officer's recommendation and revoked Jones's parole.

The Opinion of the Court of Appeals succinctly set forth the underlying uncontested factual basis of the habeas corpus action at pp 1-2 of its slip opinion (App, pp 6a-7a)

> This original action comes before us on plaintiff's complaint for habeas corpus.[1]
>
> Plaintiff was originally convicted of delivery of a controlled substance and sentenced to a term of six to twenty years in prison. Plaintiff was released on parole on October 2, 1998. Plaintiff's record while on parole was less than exemplary, having been charged with a number of parole violations. These violations resulted in diversions to the Technical Rules Violation Center, as well as an extension of the term of his parole.
>
> Then on March 11, 2001 plaintiff was arrested by the Ypsilanti Police Department following a traffic stop when the police saw a passenger in plaintiff's car throw out a bottle. After the passenger exited the vehicle and was talking to the police, plaintiff turned off the vehicle lights, sped away and eluded police. He was later arrested for obstruction of justice and lodged in the Washtenaw County jail. On March 12, he was charged with three counts of parole violation, alleging failure to report to his parole agent on February 13, 2001, testing positive for cocaine on February 6, 2001, and for engaging in a violation of law when he attempted to elude police on March 11. Plaintiff pled true to the first two counts and not true to the third count.
>
> A formal hearing was convened on May 16, 2001. The hearing officer dismissed the third count because the hearing was held more than forty-five days after plaintiff was available for return to the Department of Corrections. However, following the hearing of mitigation evidence, the hearing officer recommended that plaintiff's parole be revoked based on the first two counts and that he continue to be incarcerated for eighteen months before further parole consideration. The Parole Board adopted the recommendation.
>
> [1] Although plaintiff apparently unsuccessfully pursued habeas corpus in the circuit court, this case is an original action in this Court, not an appeal from the circuit court's denial of habeas corpus.

Jones filed an original Complaint for a Writ of Habeas Corpus with the Court of Appeals pursuant to MCR.3.303(A)(2). He argued parole violation counts I and II (to which he pleaded guilty at his arraignment) must be dismissed because the mitigation hearing was not provided within 45 days and a Writ of Habeas Corpus should issue reinstating him to parole.

The Department opposed the issuance of the writ, arguing that Jones had been provided with an opportunity to contest the charges of parole violation but elected to plead guilty at an arraignment which was held thirty-nine days after he had become available for return to a state correctional facility. Further, the Department contended that holding the mitigation hearing more than forty-five after Jones's availability did not result in a loss of the Department's jurisdiction.

The Court of Appeals held that MCL 791.240a(1) provided the plaintiff with entitlement to a hearing within 45 days after his return to the Department. Although not specifically stated, the Court of Appeals applied the 45-day hearing requirement to the mitigation stage and relied upon *Stewart v Department of Corrections, Parole Board*, 382 Mich 474, 479; 170 NW2d 16 (1969), and *In re Lane*, 377 Mich 695 (1966) which reversed without comment *In re Lane*, 2 Mich App 140, 144; 138 NW 2d 541 (1965). (App. pp 6a-7a)

The Department seeks an Order reversing the November 30, 2001, decision of the Court of Appeals because a mitigation hearing held more than 45 days after a parolee's availability for return to a state correctional facility is not a jurisdictional defect.

ARGUMENT

I. The Parole Board maintained jurisdiction to revoke the parole of a parolee accused of parole violation who entered guilty pleas at an arraignment proceeding held prior to the 45th day of his availability for return to the Department of Corrections, but was provided with the mitigation opportunity after the 45th day of his availability for return to the Department.

A. Standard of Review

A Complaint of Habeas Corpus is designed to test the legality of detaining an individual and restraining him of his liberty. *In re Huber*, 334 Mich 100; 53 NW2d 609 (1952); *Trayer v Kent County Sheriff*, 104 Mich App 32; 304 NW2d 11 (1981). A writ of habeas corpus deals only with radical defects that render a judgment or a proceeding absolutely void. *In re Stone*, 295 Mich 107; 294 NW2d 156 (1940); *Walls v Director of Institutional Services*, 84 Mich App 355; 269 NW2d 599 (1978). Habeas corpus does not operate retroactively. A radical defect in jurisdiction contemplates an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission. *Hinton v Parole Board*, 148 Mich App 235; 383 NW2d 626 (1982), quoting from *People v Price*, 23 Mich App 663, 671; 179 NW2d 177 (1970).

The interpretation of MCL 791.240a is a question of law. The standard of review is whether there was legal error. See *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). Questions of law are reviewed *de novo*. See *Cardinal Mooney High School v Michigan High School Athletic Association*, 437 Mich 75, 80; 467 NW2d 21 (1991).

1. The Court of Appeals' reliance upon cases that applied to a statute repealed in 1968 resulted in significant palpable error.

The Court of Appeals' November 30, 2001 Opinion relied upon the decisions in *Stewart v Dept of Corrections, Parole Board*, 382 Mich 474; 170 NW2d 16 (1969) and *In re Lane*, 377 Mich 695 (1966). Each of those cases applied MCL 791.240 to the facts of the individual case.

However, MCL 791.240 was repealed by PA 1968, No 192 § 2 effective November 15, 1968. The repeal of a statute divests all inchoate rights that have arisen under the statute which it destroys. *Detroit Trust Co v Allinger*, 271 Mich 600, 610; 261 NW 90 (1935). The consequence of a repeal is to destroy the effectiveness of the repealed statute as if it never existed. 1A Sutherland Statutory Construction (4th ed), § 22,23, p 279. The Court of Appeals' reliance upon the decisions in *Stewart, supra* and *In re Lane, supra* regarding the application of MCL 791.240 effective November 15, 1968, was wrong as a matter of law. The question of whether habeas corpus should have issued was dependent on the application of MCL 791.240a, and not the repealed MCL 791.240.

2. The due process requirements set forth in *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972) and MCL 791.240a do not require Jones's reinstatement to parole where he pleaded guilty to violations of parole but was provided a tardy mitigation hearing.

In *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972), the U.S. Supreme Court was asked to determine whether due process applied to a parole revocation and if so, the extent of process required for a state to revoke the conditional liberty. Michigan's statutes regarding the parole revocation (MCL 791.240a) were enacted to conform to the *Morrissey* standards. See attachment C, House Legislative Analysis, House Bill 4162, 11-15-82, at p 4 column 2, ¶ 5. (App, p 16a). State House Bill 4162 became MCL 791.240a.

The minimum requirements applicable to parole revocation include: a) written notice of the claimed violations; b) disclosure of evidence against the parolee; c) an opportunity to be heard and present witnesses and documentary evidence; d) the right to confront and cross-examine adverse witnesses; e) a neutral and detached hearing body; and f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. *Morrissey*, 408 US at 488-489.

In discussing the hearing requirement, the U.S. Supreme Court held that the parolee must have an opportunity to be heard and show, if he can, that he did not violate the conditions or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation. The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months would not appear to be unreasonable. *Morrissey,* 408 US at 488.

MCL 791.240a provides in relevant part as follows:

> Sec. 40a. (1) Within 45 days after a paroled prisoner has been returned or is available for return to a state correctional facility under accusation of a parole violation other than conviction for a felony or misdemeanor punishable by imprisonment under the laws of this state, the United States, or any other sate or territory of the United States, the prisoner is entitled to a fact-finding hearing on the charges before 1 member of the parole board or an attorney hearings officer designated by the chairperson of the parole board. The fact-finding hearing shall be conducted only after the accused parolee has had a reasonable amount of time to prepare a defense. The fact-finding hearing may be held at a state correctional facility or at or near the location of the alleged violation.
>
> (2) An accused parolee shall be given notice of the charges against him or her and the time, place, and purpose of the fact-finding hearing. At the fact-finding hearing, the accused parolee may be represented by an appointed or retained attorney and is entitled to the following rights:
>
> (a) Full disclosure of the evidence against him or her.
>
> (b) To testify and present relevant witnesses and documentary evidence.
>
> (c) To confront and cross-examine adverse witnesses unless the person conducting the fact-finding hearing finds on the record that a witness is subject to risk of harm it his or her identity is revealed.
>
> (d) To present other relevant evidence in mitigation of the charges.

Jones was provided with the opportunity to contest parole violation counts I and II. On April 19, 2001, the 39th day of Jones's availability to the MDOC, an arraignment hearing was conducted by an attorney-hearing officer. Jones did not contest counts I and II and pleaded true to each count. The question for the Court of Appeals was whether due process also required the Department to provide Jones with the opportunity to present mitigation within 45 days of Plaintiff's availability, and if Jones was not provided with the mitigation opportunity within the

45 days, did loss of jurisdiction for the Parole Board result and require Jones's reinstatement to parole?

MCL 791.240a(1) requires the Department to provide Jones with an opportunity to contest the charges at a hearing held within 45 days of his availability to the Department. Jones was provided the opportunity and did not contest Counts I and II, but pleaded true to each. While MCL 791.240a(2)(d) requires the Department to provide Jones with the opportunity to present mitigation, that subsection does not include a specific time requirement for the mitigation presentation. The only requirement in the statute concerning the reinstatement of a parolee to parole is found at MCL 791.240a(4): If the evidence presented is insufficient to support the allegation that a parole violation occurred, the parolee shall be reinstated to parole.

The U.S. Supreme Court recognized that the revocation of parole was not part of a criminal prosecution and that the full panoply of rights due a (criminal) defendant did not apply to parole revocation. *Morrissey*, 408 US at 480. The Court also recognized that due process in parole revocation was flexible and called for such procedural protections as the situation demanded.

> To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure. [*Morrissey*, 408 US at 481.]

Because not all rights due a criminal defendant apply to parole revocation, the Department believes the comparison of the 180-day speedy trial rule is instructive. MCL 780.181 provides that an inmate of a state correctional facility may demand to be brought to trial within 180 days of requesting the county prosecuting attorney to dispose of the untried complaint. Courts have held that even holding a preliminary exam within 180 days may

constitute compliance with the statute. *People v Gambrell*, 131 Mich App 167,173; 345 NW2 666 (1987). MCL 780.131 does not require completion of the trial within 180 days, but obligates the prosecution to take good faith efforts during the 180-day period and thereafter to proceed to ready the case. *People v Crawford*, 161 Mich App 77, 83; 409 NW 2d 729, (1987), remanded 462 NW2d 368, reconsideration denied, certiorari denied 112 S Ct 224; 502 US 879; 116 L E 2d 181, rehearing denied 112 S Ct 628; 502 US 1001; 116 L Ed 2d 648.

The factors considered in determining whether the right to a speedy trial rule has been violated include: 1) the length of the delay; 2) the reasons for the delay; 3) whether defendant asserted the right; and 4) whether defendant has been prejudiced by the delay. *Barker v Wingo*, 408 US 514,530-532; 94 S Ct 2182; 33 L Ed 2d 101 (1972). Prejudice in the ability to rebut the charge is the most important consideration. *People v Grandberry*, 102 Mich App 769,774; 302 NW2d 573 (1980).

The delay in the presentation of mitigation was 21 days. Jones did not object to the May 16, 2001 mitigation proceeding. Jones did not claim any prejudice in his ability to present mitigation. While a lengthy delay could conceivably result in prejudice, (such as losing contact with potential witnesses or the loss of recollection by a witness) no prejudice to Jones was claimed or existed. Jones's arraignment was conducted on the 39th day of his availability to Defendant. He pleaded true to Counts I and II. The delay in the presentation of mitigation when considered under the *Morrissey* standard does not justify the Court of Appeals' decision to grant a Writ of Habeas Corpus and should be reversed by this Court.

3. Absent an express sanction provided by statute, the Court of Appeals erred in granting the Writ of Habeas Corpus.

MCL 791.240a contains no express requirement that a parolee accused of parole violation be reinstated to parole in the event of a tardy mitigation hearing. Likewise, there is no express

provision regarding the consequences of not beginning or completing the fact-finding hearing within 45 days. If it were the Legislature's intent for the Parole Board to lose jurisdiction by conducting the mitigation portion of the hearing in excess of 45 days, it would have enacted this requirement into law as it has done in other statutes. For example, in the statute concerning charges against prison inmates MCL 780.133 clearly provides that if action is not commenced within the time limitation (180 days), the Court will be without jurisdiction and the case shall be dismissed with prejudice.

The Sixth Circuit Court of Appeals addressed a similar issue in *In re Siggers,* 132 F 3 333 (6th Cir 1997). Inmate Siggers moved the federal district court to consider a second petition for a writ of habeas corpus. Warden Jimmy Steagall defended against Siggers' motion arguing that Siggers had failed to comply with 28 USC § 2244(b) as amended by § 106(b)(1) and (2) of the Antiterrorism and Effective Death Penalty Act of 1996 and was therefore not entitled to file a second habeas petition in the district court. 28 USC § 2244(b) permits the federal Court of Appeals to authorize a second habeas petition only after a three-judge panel determined the applicant met the requirements of 28 USC § 244(b)(1) and (2). However, 28 USC § 2244(b)(3)(D) states: "The Court of Appeals shall grant leave or deny the authorization to file a second or successive application not later than 30 days after the filing of the action."

Inmate Siggers contended that because the thirty-day provision used the words "shall", the failure by the Court of Appeals to rule on his motion deprived the court the power to do so and interfered with the power of the Court of Appeals to control cases before the court. Warden Steagall responded that since 28 USC § 2244(b)(3)(D) did not specify a consequence for non-compliance with the thirty day requirement, the court retained the discretion to grant or deny an

order of authority after the exemption of thirty days. Warden Steagall contended that the thirty-day provision was not jurisdictional. See *In re Siggers,* 132 F 3, at 335.

In holding that the Court did have authority to decide an application for the petition after the expiration of thirty days the Court of Appeals stated that the law is well established in this and other jurisdictions "that [a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision." As authority, the *Siggers* Court referenced to *3 Norman J. Singer, Sutherland on Statutes and Statutory Construction,* § 57.19 & n. 6 (5th Ed, 1992 rev. & Sup 1997) (collection of cases holding provisions that require decisions by courts, referees, and administrative agencies within specific time frames to be discretionary rather than mandatory).

There is a presumption against divesting a court of its jurisdiction once it has properly attached, and any doubt is resolved in favor of retaining jurisdiction. *People v Veling,* 443 Mich 23, 32; 504 NW2d 456 (1993). Also, see *Department of Consumer and Industry Services v Greenberg,* 231 Mich App 466, 468-469; 586 NW2d 560 (1998) (violations of deadlines in Public Health Code does not require dismissal of complaint); *People v Levandowski,* 237 Mich App 612, 617-618; 603 NW2d 831 (1999) (failure to comply with seven day requirement to sign a judgment of sentence does not divest court of jurisdiction to enforce the sentence.

Absent an express sanction provided for by statute, the Court of Appeals erred in finding the Parole Board was without jurisdiction to revoke Jones's parole.

CONCLUSION

The Court of Appeals' erred by failing to examine MCL 791.240a together with the caselaw subsequent to the enactment of MCL 791.240a. The Court of Appeals further erred by finding a loss of Parole Board jurisdiction where no portion of MCL 791.240a provides the loss of jurisdiction as a sanction for a tardy mitigation proceeding. The Court of Appeals recognized the significance of the issue in requesting the Department to seek review in the Supreme Court and for the Supreme Court to reverse.

RELIEF SOUGHT

For the foregoing reasons, Defendant-Appellant requests the Court reverse the November 30, 2001 Opinion Order of the Court of Appeals, and holding that failure to hold the mitigation hearing within 45 days as provided for by MCL 791.240a did not deprive the Parole Board of jurisdiction to revoke parole.

Respectfully submitted,

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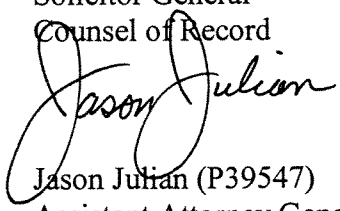

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